both women and men as a matter of course.[46]

In fact, the inclusion of women because of their perspectives is thought to be important in a wide variety of situations. For example, following Clarence Thomas' Supreme Court Confirmation hearing, one author observed, "[t]he most universally agreed-upon conclusion after [Professor Anita Hill testified, was that] a woman on the committee would have made all the difference in the world."[47]

Even where both genders are equally interested in an issue, such as defense spending, the economy or the death penalty, women policy makers tend to view it differently and emphasize different aspects.[48] For example, women legislators were less convinced than their male colleagues of the private sector's ability to solve economic problems, more likely to oppose the death penalty and more likely to oppose construction of additional nuclear power plants.[49]

Similarly, a study of female judges found that many female judges believe they bring "unique perspectives and life experiences different from those of men," to the bench, which otherwise would go unrepresented.[50] The study found,

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[46]Kay Mills, A Place in the News: From the Women's Pages to the Front Pages 10 (1988).

[47]Finkel at 18.

[48]Dodson and Carroll at 14.

[49]Id.

[50]Elaine Martin, Judicial Gender and Judicial Choices, in Dodson on Gender, at 51, 53.

> Th[e] connection between personal experiences, the attitudes developed from those experiences and their subsequent impact on judicial behavior is the same for women as for men, but with a significant twist. Women's experiences are different as a consequence of their gender, leading to potential differences in attitudes with regard to gender issues.[51]

The result, some analysts have found, is that diversifying the formerly all-male judiciary has begun to ensure fairer, more balanced decision-making.[52] Likewise, the Supreme Court has reasoned that women must be included in jury pools because women bring "their own perspectives and values" to the process.[53] The Court found,

> [I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. . . . The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both . . . . To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.[54]

Thus, since women contribute different viewpoints and perspectives in each of these areas, women owners and upper level employees of mass media facilities will also impart diverse perspectives to the management choices made and the programming

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[51] Id. at 51.

[52] See, e.g., Carl Tobias, Commentary: The Gender Gap on the Federal Bench, 19 Hofstra L. Rev. 171 (1990); Elena F.Rand, Women Judges Making a Difference (1990), Internship Program, Woodrow Wilson School of Public Affairs, Princeton University; Sheila Weller, Taking the Law into Her Own Hands, Redbook, June 1992, at 94.

[53] Taylor v. Louisiana, 419 U.S. 522, 531-32 & n. 12 (1975), quoting Ballard v. United States, 329 U.S. 187, 193-194 (1946).

[54] Id. at 531.

aired at their broadcast stations. In this regard, it is important to keep in mind that approximately half of the community served by each broadcast station is female. Therefore, by making the ownership and management of stations more representative of the communities they serve, stations are more likely to be responsive to community needs.

C. Women Owners Help Improve the Portrayal of Women

Finally, studies conclude that increasing the number of women as owners and station employees helps to remedy the poor portrayal of women by the media on the media. A study conducted by the National Commission On Working Women analyzing eighty entertainment programs aired during the spring of 1990, concluded "women continue to fare poorly on television -- both on screen and behind the camera."[55] The study found that twice as many male characters were over 40 than female characters, almost all of the women appearing on-screen were under 50 (95%), and most women characters were employed as clerical workers.[56] Older women tended to play grandmothers and mothers, as contrasted to older men, whose roles embodied authority and power.[57] Nearly all leading roles were played by men, and adolescent boys

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[55]The National Commission On Working Women of Wider Opportunities for Women, What's Wrong With This Picture? The Status of Women On Screen and Behind the Camera in Entertainment Television 5 (1990)[hereinafter WOW Study].

[56]Id. at 8,9 (analyzing all 555 characters appearing on the programs).

[57]Id. at 34.

received much more attention than adolescent girls.[58]

The study further found that women made up only 15% of producers, 9% of directors, and 25% of writers. It concluded that no improvement could be expected until the number of women producers increased, and the "diverse workers behind the camera [were required] to capture a diverse viewing audience."[59] Similarly, until more women are in positions to determine what programming a station will air, the unrealistic and stereotypical portrayal of women will not significantly improve.

D. The FCC May Constitutionally Adopt Policies Designed to Increase Women's Ownership of Mass Media Facilities

Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) does not bar the Commission from adopting preferential policies for women.[60] Applying intermediate scrutiny, the majority in Lamprecht found the practice of giving preference to women in comparative hearings unconstitutional because the Commission failed to adequately demonstrate the nexus between female ownership and program diversity.[61] Thus, the Notice asks whether there exists a nexus between female ownership of mass media facilities and an increase in diversity of programming.[62]

At the time Lamprecht was decided there was little factual

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[58] Id. at 6, 28.

[59] Id. at 6, 67.

[60] Notice at ¶ 7.

[61] Lamprecht v. FCC, 958 F.2d 382, 395 (D.C. Cir. 1992).

[62] Notice at ¶ 7.

record to sustain the gender preference.[63] Thus, the Court considered "the only study, so far as we know, either inside or outside the legislative record, that actually did examine the possibility [of women broadcasting differently than men]: the Congressional Research Service report."[64]

As shown above, however, there is now ample evidence demonstrating the nexus between women's ownership of broadcast facilities and viewpoint diversity. Were the FCC to conclude based on the record established in this proceeding that a nexus existed between female ownership and diversity, a court would likely defer to the Commission's findings. As the Supreme Court held in Metro Broadcasting, Inc. v. FCC, "[w]ith respect to [a] 'complex' empirical question, we are required to give great weight to the decisions of Congress and the experience of the Commission."[65]

Moreover, the Lamprecht majority's conclusion that an insufficient nexus existed between female ownership and diverse programming focused only on the narrow goal of increasing "women's programming," and not on the government's actual objec-

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[63]The comparative preference for female owners was not adopted after a rulemaking, but rather "a few Commission employees without any evidence, reasoning or explanation, gratuitously decreed one day that female preferences would henceforth be awarded." Steele v. FCC, 770 F.2d 1192, 1199 (D.C. Cir.), vacated en banc, No. 84-1176 (Oct. 31, 1985).

[64]Lamprecht, 958 F.2d at 395.

[65]Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 569 (1990). See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102-103 (1973); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 414, 416 (1971).

tive of increasing programming diversity in general.[66] As the Supreme Court observed in Metro, however, broadcast diversity does not mean programming intended just for women or minorities, but that "varying perspectives will be more fairly represented on the airwaves."[67] In this proceeding, the Commission has the opportunity to establish the governmental interest in a much

[66]Lamprecht, 958 F.2d at 395. The majority stated,

> Implicit in the government's judgment are at least three assumptions: first, that there exists such a thing as "women's programming". . .; second, that these distinct types of programming are underrepresented on the airwaves; and third, that women who own radio or television stations are likelier than white men to broadcast these distinct types of programming. Id. (emphasis added)

In its policies to increase women ownership of mass media facilities, the Commission envisioned a far broader goal of increasing viewpoint diversity, not just expanding "female programming." A Commission representative testified that no specific definition of "female programming" was necessary because "[t]he purpose of the female preference is to increase female ownership in order to promote viewpoint diversity."(emphasis added). Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transp., 101st Cong., 1st Sess. at 78 (1989). See also 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989) (discussing appropriation rider); 135 Cong. Rec. S12,265 (daily ed. Sept. 29, 1989) (intent to improve service to all audiences, including female and minority groups); Matthew L. Spitzer, Justifying Minority Preferences in Broadcasting, 64 S. Cal. L. Rev. 293, 330 (1991) (discussing Congressional intent).

The Lamprecht court's belief that women owners must offer women's programming to justify policy preferences only further perpetuates archaic stereotypes that are unconstitutionally impermissible.

[67]Metro, 497 U.S. at 582.

broader definition of viewpoint diversity.[68] The data from many different areas strongly supports the conclusion that increasing the representation of women in broadcast station ownership will lead to greater diversity in viewpoints presented by those broadcast stations. Thus, it is constitutionally permissible for the FCC to adopt incentives designed to increase the number of women-owned broadcast facilities.

III. THE COMMISSION SHOULD USE AN ECONOMIC RATIONALE AS AN ALTERNATIVE LEGAL JUSTIFICATION FOR ITS PROPOSED INITIATIVES TO INCREASE OWNERSHIP OF MASS MEDIA FACILITIES BY MINORITIES AND WOMEN

As explained above, the Commission has historically relied on a diversity rationale to justify the adoption of incentives to increase ownership of mass media facilities by women and minorities. Nevertheless, at ¶ 8 of the Notice, the Commission seeks comment on whether it should consider an economic rationale as an alternative legal justification for its proposed initiatives to increase minority and female ownership of mass media facilities.[69] Specifically, the Commission seeks comment on whether minorities and women lack access to capital when others, similarly situated, do not face any other disadvantages that are more prohibitive than the disadvantages traditional

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[68]The purpose of increasing broadcast diversity goes beyond producing programming aimed at one specific group, but rather benefits all viewers by advancing the "widest possible dissemination of information from diverse and antagonist sources. . .." FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)). See also Second Report and Order in MM Docket No. 87-7, 4 FCC Rcd 1741, 1743 (1988).

[69]Notice at ¶ 8.

participants in the marketplace face; and encounter greater costs of capital due to higher than market rate loans, restrictive loan covenants or other restrictions.[70] Commenters will demonstrate that minorities and women have been disadvantaged and that society as a whole benefits from the full participation of minorities and women in the economy. Therefore, we urge the Commission to rely on an economic rationale as an additional legal justification for providing incentives to minorities and women to own mass media facilities.

A. The Encouragement of Minority- and Women-Owned Mass Media Facilities Benefits the U.S. Economy As a Whole

Minority- and women-owned businesses are critical to the United States' economy. The number of minority-owned businesses increased 63.77%, from 741,640 in 1982 to 1,213,750 in 1987.[71] Despite this increase, however, minority businesses are still underrepresented in relationship to the minority population.[72] The U.S. Commission on Minority Business Development concluded

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[70] Id.

[71] United States Bureau of the Census, U.S. Dept. of Commerce, 1987 Survey of Minority Owned Business Enterprises, at 2. Between 1982 and 1987, the number of Black-owned firms increased 37.6%, from 308,260 to 424,165 and by 1987. Id. In 1982, Hispanics owned 233,975 businesses which increased 37.6% to 422,373 in 1987. Id. American Indians and Alaska Natives owned 13,573 businesses in 1982 which increased 57.5% in 1987 to 21, 380. Id. Similarly, Asians and Pacific Islanders owned 187,691 in 1982 which increased to 355,331 in 1987, a total increase of 89.3%. Id.

[72] NTIA, Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries, (Apr. 1995) at 6 [hereinafter 1995 NTIA Report]. While minorities comprise 25% of the U.S. population, minority businesses represent only 9% of all businesses. Id.

that "it makes absolutely no economic sense to squander more than 20% of the nations most precious resource -- human talent."[73]

Similarly, statistics compiled by the National Foundation for Women Business Owners (NFWBO) also indicate the number of women-owned businesses grew from 5.4 million in 1990, to 6.5 million in 1992 and as of 1994 women owned 7.7 million businesses.[74] By the year 2000, women are expected to own 40 percent of all businesses.[75] And women-owned businesses in the United States employ more people than do all of the Fortune 500 Companies combined.[76] Therefore, minority- and women-owned businesses contribute to the health of the economy by increasing the number of businesses operating in the U.S. and by increasing employment opportunities too.

Also critical to the United States economy is the telecommunications industry. As Chairman Hundt recently pointed out:

> The communications, information and entertainment sectors of our economy nearly doubled in size between 1982 and 1993. These sectors will account for about one-sixth of the Gross Domestic Product by 1998. Hundreds of thousands of high-wage jobs are being created in the telecommunications industry. Our competitiveness in the global economy and sustained

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[73]U.S. Commission on Minority Business Development, Final Report, 1992 at 113.

[74]The National Foundation for Women Business Owners, Women-Owned Businesses: Breaking the Boundaries, Apr. 1995 at 2-5 [hereinafter 1995 NWFBO Report].

[75]Lindsey L. Johnson, Small Business Administration, Resources for the Growing Constituency: Women Entrepreneurs 1 (1994).

[76]1995 NWFBO Report at 4.

> growth in our economy at home depend on the continued growth and improvement of this industry.[77]

And as witnessed in the personal communication service spectrum auctions, women and minority owned firms are playing a particularly important role in this growth.[78]

Nevertheless, as discussed in Section I above, minorities and women continue to be underrepresented as owners of mass media facilities. The risk associated with the underrepresentation of minorities and women in this industry is that the problem will escalate and become not just an underutilization of talent, but

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[77]Federal News Service, Mar. 22, 1995. Similarly, according to Larry Irving, "[g]enerating more than $590 billion in annual revenues, the telecommunications and information sectors clearly are important today, and will be even more important in the future. Long-term economic prosperity and job growth in the United States are strongly tied to the success of these industries." FY '96 Commerce, Justice, State Appropriations: Hearings before the Subcomm. on Commerce, Justice, State, The Judiciary and Related Agencies of the House Comm. on Appropriations, 104th Cong., 1st Sess. (Mar. 25, 1995)(statement of Larry Irving, Assistant Secretary, Comm. and Information, U.S. Department of Commerce).

[78]According to United States House of Representatives Congressman Markey,

> Just as I said back in July, after the nationwide auction for narrowband PCS generated over $600 million, the real opportunity for small businesses and minorities would be in the regional licenses-- and small businesses and minorities and women seized those opportunities, "The results from this auction, combined with the results from the FCC's auction in July, mean that taxpayers will receive over $ 1 billion, new business opportunities will be created, and consumers will get next-generation communications services soon."

Congressional Press Release, Nov. 7, 1994.

an "increasing drain on the nation's wealth."[79] Therefore, for the U.S. to realize "maximum economic and social benefit from growth in telecommunications industries, ownership opportunities must be available to all Americans."[80]

B. In a Capital Intensive Industry, The Primary Obstacle Minorities and Women Face in Becoming Owners of Mass Media Facilities is Their Lack of Access to Capital

As discussed above, minorities and women increasingly own successful small businesses. Minorities and women have also made substantial gains as employees of broadcast stations.[81]

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[79]U.S. Commission on Minority Business Development, Final Report, at 13. See also 1995 NTIA Report at 31, citing Andrew F. Brimmer, The Economic Cost of Discrimination, Black Enterprise, Nov. 1993, at 27 ("racial bias deprived the American economy of $215 billion in 1991, equal to 3.8% of the gross domestic product").

[80]1995 NTIA Report at 2. Promoting economic opportunity is recognized as an important governmental interest. The Supreme Court found in Fullilove v. Klutsnick, 448 U.S. 448 (1980), that a Congressional set aside program was premised on remedying societal discrimination that prevented minority businesses from equal participation in state and local public works contracts. The Supreme Court has also stated that "[r]eduction in the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." Califano v. Webster, 430 U.S. 313, 317 (1977). See also, Associated General Contractors v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987)(remedying disadvantages women faced in the market place is an important governmental interest); Coral Construction Co. v. King County, 941 F.2d 910, 932 (9th Cir. 1991)(The county "has a legitimate and important interest in remedying the many disadvantages that confront women business owners.")

[81]Implementation of Commission's Equal Employment Opportunity Rules, Report, 9 FCC Rcd 6276 (1994) ¶ 35-36. From 1986 to 1993, women in the broadcast industry increased from 37.4% to 39.6 percent, a net increase of 2.2%. Id. at ¶ 35. Women in the upper-level positions increased from 29.2% to 32.8%, a net increase of 3.6%. Id. Similarly, minorities in the broadcast industry increased from 16% to 18.2%, a net increase of 2.2%. Id. at ¶ 36. Minorities in the total upper level job

Therefore, their continued underrepresentation as owners of mass media facilities is not due to lack of experience or desire to become owners. Rather, they lack the access to capital to own capital intensive businesses such as mass media facilities.[82]

Both the Minority Advisory Committee on Alternative Financing and the National Woman's Business Council have found that the telecommunications industry is highly capital intensive.[83] A special report to Broadcasting and Cable confirms the capital intensive nature of financing the purchase of broadcast station reporting that the average price to purchase a television station in 1993 was approximately $3 million.[84] Similarly, the average price to purchase a radio station in 1992

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categories increased from 13.7% to 16.1%, a net increase of 2.4%. Id.

[82] 1995 NTIA Report at iii, 2, 17-20 (discussing how minority broadcasters in three case studies overcame barriers in access to capital to obtain equity capital ranging from $9,000 to $100,000 and an additional up front investment from $64,000 to $4,100,000).

[83] Strategies for Advancing Minority Ownership Opportunities in Telecommunications, The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission, May 1982, at 40; National Women's Business Council, Annual Report to the President and Congress, at 15 (1990).

[84] Gallagher, John, Special Report, Station Trading: Duopoly Rules Spur Radio Activity, Broadcasting and Cable, Feb. 3, 1993 at 39. According to a survey of station trading in 1994, sales for television stations were as high as $120.17 million per station. Julie A. Zier, Station Sales Encore in '94, Broadcasting and Cable, Feb. 27, 1995 at 32.

was $2 million.[85]

The capital intensive nature of financing a television or radio broadcast facility results in part from the fact that many stations were originally licensed by the FCC at a time when minorities and women were subject to de jure or de facto discrimination in education, employment and access to capital.[86] As a result, few, if any, minorities and women competed for the licenses available at that time. Moreover, due to spectrum scarcity, the number of licenses is finite and virtually all licenses have long since been awarded.

Thus, to get into the broadcast business, a new entrant has to purchase one of the limited number of licenses from an existing owner. As explained by Raul Alarcon, President and CEO of the Spanish Broadcasting System, Inc., the largest Hispanic-owned media company in the United States:

> Unlike virtually any other business in this country, you can not get into the radio broadcast industry at will. If you can raise the capital to open a restaurant, or a dry cleaner, or a shoe store, you can go into business right away. But if you want to own and operate a radio station, you must raise the capital -- and you must find someone who is willing to sell you the station. . . For minority

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[85]Julie A. Zier, Station Prices Up Sharply over '92, Broadcasting and Cable, Sept. 6, 1993 at 40. The sale price of standalone FMs rose from 1993's $743.5 million to $835 million. Julie A. Zier, Station Sales Encore in '94, Broadcasting and Cable, Feb. 27, 1995 at 32. Standalone AM's totaled $132.3 in 1994. Id.

[86]See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700, 7828 (1993)(at Appendix C Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen Docket 90-314 (Sept. 15, 1993)).

buyers, such opportunities are few and far between.[87]

Both minorities and women face barriers that prevent them from obtaining the financial resources needed to purchase and operate broadcast stations. According to the United States Commission on Minority Development, when minority entrepreneurs were asked to rank their major problems, they responded that lack of access to financing was their biggest obstacle in becoming business owners.[88] Robert Johnson, President of Black Entertainment Television, characterized it as a problem of the capital haves and have nots.[89] Similarly, the National Women's Business Council (NWBC) named access to capital as the foremost barrier businesswomen face in starting and maintaining a

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[87]Hearings on the Federal Communications Commission's Tax Certificate Program: Hearings Before the Senate Comm. on Finance, 104th Cong., 1st Sess. 2 91995)(testimony of Raul Alarcon, Jr., President and Chief Executive Officer, Spanish Broadcasting Systems, Inc.)(emphasis added).

[88]United States Commission on Minority Business Development, Final Report, 1992, at 12, 81. A recent Roper poll of 500 black entrepreneurs revealed that 83% found rasing capital a very serious problem, and that 91% believed this was because black-owned businesses were thought to be high-risk investments. Black Entrepreneurs: Have Capital, Will Flourish, The Economist, February 27, 1993, at 33. Lack of access to capital is one of the factors that has historically led to the high failure rate of black businesses. Shelly Branch, In Search of Money, Black Enterprise, Apr. 1992, at 83. Research suggests that the historic underrepresentation is more attributed to lower minority business formation rates than to higher failure rates in comparison to non-minorities. 1995 NTIA Report at 7 citing Richard L. Stevens, Minority Business Entrepreneurship, Small Business in the American Economy, U.S. Small Business Administration, Office of Advocacy (1988), at 167.

[89]Hearings on the Federal Communications Commission's Tax Certificate Program: Hearings Before the Senate Comm. on Finance, 104th Cong., 1st Sess. (1994)(testimony of Robert Johnson, President of Black Entertainment Television).

business.[90]

Access to capital is a particular problem for minorities and women, for two main reasons. First, minorities and women have relatively less personal wealth to invest. Second, minorities and women continue to face discrimination by financial institutions.

1. Minorities and women have relatively less personal wealth to invest in mass media facilities

Unlike many entrepreneurs starting a business, minorities and women have less personal wealth to invest in business ventures then relied on by other entrepreneurs.[91] This is because minorities tend to realize lower financial returns on their education and as a result, they have substantially lower net worth.[92] The median net worth of white households is more than ten times that of minorities.[93] This disparity in net worth is, in part, a result of the historic wage differential

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[90]National Women's Business Council, Annual Report to The President and Congress (1992).

[91]Gualberto Medina, Minority Access to Capital, S&P's The Review of Banking and Financial Services, May 19, 1993, at 95 [hereinafter Medina]. Net worth measures the combined effect of employment, income, and accumulation of assets through savings, purchases, gifts, or inheritance. Id.

[92]Id.

[93]Id. at 95. In 1988, African-Americans and Hispanics had respective median net worths of $4,169 and $5,524; white households, however, had a median net worth of $43,279. Id. Moreover, Hispanics and African-Americans held most of their net worth in durable goods, such as housing and motor vehicles, as opposed to stock and mutual fund shares. Id.

between minorities and non-minorities.[94]

Additionally, minorities also rely more on family income to finance business formation than their white counterparts.[95] For example, for 82% of minority start-up businesses, personal savings were the most important source of financing, compared to 59% of white firms.[96] In a study of the determinants of minority business formation, one researcher found:

> The heavy reliance on family income or personal savings for business formation is bound to lead to a low rate of business formation, since most minority people have very little personal savings. It will also lead to the formation of more small-scale business, which require little capital.[97]

Capital intensive ventures, such as owning and operating mass media facilities, are consequently beyond the financial reach of many minorities.

Women face similar problems in obtaining capital. Women

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[94]A 1994 report to the Glass Ceiling Commission concluded that "the allocation of many women of all ethnic backgrounds and minority men to lower quality jobs than they can perform directly creates gender and race/ethnic earning inequalities." Donald Tomaskovic-Devey, Race, Ethnic, and Gender Earnings Inequality: The Sources and Consequences of Employment Segregation, A Report to the Glass Ceiling Commission, U.S. Department of Labor, Jan. 1994. Further, the report shows substantial earnings differences that were not a result of differences in work experience, time with a firm or differences in education. Id. The research reflected that white men earn substantially more, have more prestige and have more power over other workers than African-Americans, Hispanics, and white women. Id.

[95]Medina, at 95 (citing to research of Nkanta F. Ekanem in Determinants of Minority Business Formation: A Detailed Industry Analysis, 24 Applied Economics at 1152 (1992)).

[96]Id.

[97]Medina, at 95.

entrepreneurs typically start out with far less capital than their male counterparts. Women are also less likely than men to receive money to invest in a new business through inheritance.[98] Lack of personal collateral is also a strike against many women who want to start a business. Almost one-quarter of the women surveyed by the National Foundation for Women Business Owners said that a lack of collateral was their biggest financial barrier.[99]

Because both minorities and women have less personal wealth and collateral to invest in a business, it is more difficult for them to own a capital intensive mass media facility.

2. Financial institutions discriminate against minorities and women, even when their education and income are equal

Without personal wealth to rely upon to begin a business,

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[98]Sharon Nelton, Daughters as Successors in Male Industries, Nation's Business, July 1993, at 48. This is because family businesses traditionally pass from fathers to sons, or other male relatives, bypassing capable daughters. Id.

[99] The National Foundation for Women Business Owners, Financing the Business: A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners at 5 (1993). Because women owned businesses are predominately service or retail oriented, they lack tangible collateral that would make a bank more willing to loan the money to enable them to become mass media facility owners. According to a report issued by the Bureau of the Census, 56 percent of women-owned businesses were home-based. The U.S. Department of Commerce, Bureau of the Census, 1987 Economic Censuses: Women-Owned Businesses (1990). In addition, three-quarters of women-owned businesses are concentrated in the less capital-intensive areas of retail trade and service. Id. A recent Marquette University study of Wisconsin entrepreneurs found that women spent a median amount of $15,000 to start a one-woman company, compared with $36,000 for male entrepreneurs. Wendy Zellner, Women Entrepreneurs, Business Week, Apr. 18, 1994, at 104.

minorities and women have traditionally turned to commercial banks for capital.[100] However, studies across the country have reached the same basic conclusion -- commercial banks discriminate against potential minority and women borrowers.[101]

The recently released Glass Ceiling Report confirms that minorities and women are subject to erroneous negative perceptions about their competence and abilities to perform in upper level management and ownership positions.[102] These perceptions in effect place a "ceiling" on the level of accomplishment minorities and women can attain, including the capital they can access. The Report found that stereotypes and prejudice keep minorities and women from succeeding at the high

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[100] 1995 NTIA Report at 12-14.

[101] See Jill Andresky Fraser, Desperately Seeking Capital, Working Woman, July 1993, at 60; Derrick Z. Jackson, Harshbarger in the Lead against a Racial Barrier by Banks, The Boston Globe, August 1, 1993, at 75 (noting lending discrimination in Boston, Houston, Milwaukee, San Francisco, and New York); Federal Reserve Bank of Boston, Working Paper Mortgage Lending in Boston; Interpreting HMDA Data, (Oct. 1992) at 92-7(found that even after controlling for financial, employment, and neighborhood differences, Hispanic and African-American housing loan applicants in the Boston metropolitan area were 60% more likely to be turned down for loans than white applicants); Liz Spayd and Joel G. Brenner, Separate and Unequal; Racial Discrimination in Home Lending, The Wash. Post, June 6 - 8, 1993 (study concluded that "race, not income or housing characteristics determined whether local banks and thrift made home loans in the DC area"); Redlining Case is Settled; Washington S&L to Invest $11 Million, The Record, August 23, 1994 at C01; Separate and Unequal, Part 1 of 3, at A1; Separate and Unequal, Part 1 of 3, Snapshots, People Behind the Numbers; Law Professor Files Suit Over Loan Rejection, June 6, 1993, at A25; Closing Minorities Out of Home Ownership, The Hartford Courant, October 27, 1992, at 10.

[102] The Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital, Washington, D.C. (March 1995) at 28 [hereinafter Glass Ceiling Report].

levels of the business world.[103] Moreover, it found that minorities and women also lack the contacts, leads and mentors necessary to discover new business opportunities and alternative means to finance a new business.[104]

A study by Dr. Timothy Bates, a Professor at Wayne State University, who has studied minority business development for over fifteen years, found that black-owned firms receive smaller loan amounts than white owned firms with identical education, age, and equity traits.[105] Dr. Bates recently reported similar findings in testimony before the House Subcommittee on Minority Enterprise, Finance and Urban Development.[106] Examining

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[103]Glass Ceiling Report, at 28.

[104]Id. at 36 (lack of mentoring and little or no access to informal communication networks provide major barriers to the advancement of minorities and women in the business world). See also 1995 NTIA Report at 30-31 (discussing recommendations to improve education and training opportunities for minorities to increase their ability to access capital).

[105]Timothy Bates, Commercial Bank Financing of White and Black Owned Small Business Start-ups, 31 Quarterly Review of Economics and Business at 64 (1991). Using a sample of 4,363 white male owned firms and 2,724 black-owned firms, Bates analyzed owners entering self-employment between 1976 and 1982 and concluded that "white owners consistently command much more financial capital than Blacks at the point of business start-up." Id. at 66. While white owners who borrowed money from a bank had a mean total financial capital of $70,927, similarly situated Black owners only had $36,009. Id. at 67. This discrimination in financing dollars was problematic because debt capital, at the start-up of the business, increased business viability. Id. at 75.

[106] Access to Credit and Capital Among Minority-Owned Businesses: Hearings Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103rd Cong., 2nd Sess. 47 (May 20, 1994)(testimony of Timothy Bates, Professor at Woodrow Wilson Center).

thousands of actual bank loan recipients, he found that "controlling for education, work experience, age, gender, and other factors, bank loan dollars, per dollar of owner equity investment" were $1.85 for white firms compared to $1.16 for black firms.[107] Further, he found that at start-up, the average white owned firm has more than twice the financial capital than the average black business.[108] More white firms (64.6%) than black firms (55.6%) borrowed from banks and the average loan amount for white firms was more than double that for black firms ($55,803 v. $25,704). Moreover, black firms were more likely to rely on personal loans, home equity loans, overdraft accounts and credit cards for business entry.[109] Dr. Bates concluded that "[m]inorities generally, and African-Americans specifically are largely shut out by financial capital barriers, which force them to favor self-employment in less capital intensive industries." Because communications is capital intensive, minority "representation in communications is so low that [he] could not even generate meaningful summary statistics on minority underrepresentation."[110]

Women also have difficulties obtaining capital because of their gender. Under common law, women were required to have

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[107] Id. at 48.

[108] Id.

[109] Id. at 50.

[110] Id. at 53.

their husbands co-sign for their loans.[111] While these laws are no longer on the books, the practice continues by many lending institutions even where a woman has a good credit history or extensive business background. Twenty percent of the women surveyed by the National Foundation for Women Business Owners said they had been asked to have their husbands co-sign loan documents.[112] In addition, one-third of women business owners perceived some degree of gender-based discrimination in their dealing with a financial institutions.[113]

This discrimination by financial institutions toward women exists despite evidence that education levels of women business owners is comparable to men.[114] The rates of women graduating from business and other professional schools rose from 9% in 1970 to 47% in 1990.[115] Moreover, women businesses are found to be just as financially strong as other U.S. firms.[116] Barbara

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[111]At common law, a married women, during the life of her husband, had no contract rights or liabilities-- she could not bind herself by a contract. 5 Williston on Contracts § 11.2 (4th ed. 1992). See also Flint v. Culbertson, 159 Tex. 243 (1958)(a married women cannot become a partner in ordinary partnership, venture or business).

[112]Desperately Seeking Capital, at 60.

[113]Financing the Business, at 5.

[114]Candida Brush, Research on Women Business Owners: Past Trends, A New Perspective, and Future Directions, Entrepreneurship: Theory and Practice, June 22, 1992, at 5.

[115]Center for Policy Alternatives, Women's Voices for the Economy Fact Sheet: Capital to Start and Expand Businesses, 1994.

[116]1995 NFWBO Report at 13-14. Only 40.5% of women-owned firms are at risk of becoming delinquent in paying their bills, compared to 44% of all U.S. firms. Id. Moreover, 92% of women-

Blum, president, chair and CEO of the Adams National Bank, a woman-owned bank, places some of the fault on the built-in bias of the decision makers at most banks and venture-capitalist firms. "They are usually white males. . I don't believe there is an overt bias, but it's there. The problem is, most financiers don't even realize that they're biased against women and minorities."[117]

Indeed, only 7 percent of partners and associates listed in the 1986 Venture Capital Association Directory were female.[118] This underrepresentation of women in the lending industry is significant because networking by gender predominates over networking activities across gender lines.[119] And women have historically been excluded from the "old boys network."

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owned firms pay their bills within 30 days of their due date. Id. Also only 14.7% of women-owned firms have a high risk of failure compared to 13.7% of all firms in the U.S. Id.

[117]Desperately Seeking Capital, at 61. A surprising number of bankers remain skeptical that women can successfully run any kind of company, regardless of experience or credit history. Janice Castro, She Calls all the Shots, Time, July 4, 1988, at 54. Women will be relegated to talking to the first level loan officer, instead of the more influential vice president. Katherine Morrall, Banks Lend Support to Women Business Owners, Bank Marketing, August 1993, at 22. Women are also often not taken seriously by banks when attempting to start a non-traditional business. For example, when Marilu Meyer, president of the $7 million-per-year Castle Construction Corporation, first went to banks about start-up funding for her construction firm, they suggested she try a T-shirt shop or a stationary store instead. Annetta Miller, Now: The Brick Wall, Newsweek, Aug. 24, 1992, at 54.

[118]Holly E. Buttner, Female Entrepreneurs: How Far Have They Come?, Business Horizons, Mar. 1993 at 59.

[119]Id.

According to Wendy Reid-Crisp, national director of the National Association for Female Executives, "[m]en still tend to belong to organizations where a handshake and a referral will get them the money they need to get started."[120]

After being turned down by a number of lending institutions for loans, many minority and women entrepreneurs turn to other, more expensive sources of financing, such as personal loans, credit cards,[121] mortgages[122] and home-equity loans to start or improve their businesses.[123] Although these alternative financing mechanisms might enable a minority or woman to own a small business, it would be impossible to rely upon these alternative financial solutions to purchase a capital intensive

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[120]Zellner, at 104. And in some male-dominated industries, associations exclude women completely. For example, the founder of Unity Lumber Products is still excluded from an all-male forest-products club known as "Hoo-Hoo International" even though she was named the SBA's 1991 Small Business Person of the Year. Annetta Miller, Now: The Brick Wall, Newsweek, Aug. 24, 1992, at 54.

[121]According to a National Foundation for Women Business Owners survey, 52 percent of women business owners used credit cards for short-term financing compared to only 18 percent of all small-to-midsize companies. Financing the Business, at 9. Using credit cards is a costly way to finance a business, but it is often the only means women have available to them to obtain capital.

[122]Even when minorities use mortgages, they are often forced to pay the higher fees and interest rates charged by mortgage companies that know in many cases, there is no other alternative. Separate and Unequal, Part 1 of 3, Mortgage Companies Fill Gap -- For a Price; Critics Say Some Firms Charge More in Black Areas, June 6, 1993, at A25.

[123]For example, the First National Bank of Chicago makes personal loans, home-equity loans, credit-card loans instead of business loans where a business is new and has no track record. Access to Capital, Priming the Pump, Inc., May 1994, at 92.

facility such as a mass media facility.

IV. THE COMMISSION SHOULD ADOPT THE INCUBATOR PROGRAM FOR MINORITIES AND WOMEN TO INCREASE THEIR OWNERSHIP OF MASS MEDIA FACILITIES

To increase minority and female owners' access to capital, the Notice requests comment on how the Commission's rules and policies might be modified. Specifically, the Notice proposes several initiatives, including (1) the development of an incubator program, (2) modifications to the rules governing attribution of ownership interests, and (3) expansion of the Commission's minority tax certificate policy.[124]

Since release of the Notice, Congress has repealed the tax certificate policy. Therefore that option, which opened ownership opportunities for many minorities, is no longer available.[125]

Commenters do not support utilizing a different attribution standard to encourage investment in minority facilities. The test for determining attributable broadcast interests should be set at a level that accurately identifies owners with some ability to influence station operation and should be the same for all. A better way to promote investment in minority and female controlled mass media facilities is to recognize ownership interests using the same attribution rules, but to permit entities who provide financial assistance by incubating minority

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[124]Notice at ¶ 15-38.

[125]President Clinton signed The Self-employed Persons Health Care Extension Act of 1995, Pub. L. No. 104-7 on April 11, 1995, eliminating use of the tax certificate policy.

or female owners to exceed the ownership limits.

The Notice describes an incubator program as:

> an arrangement whereby existing broadcasters share their talent, experience and financial resources with minorities and [women] . . . seeking to enter the mass media industry in exchange for regulatory concessions such as relief from certain multiple ownership restrictions.[126]

Commenters generally support the concept of an incubator program to increase ownership of mass media facilities by minorities and women. However, we question whether an incubator program will be successful if the Commission relaxes the national ownership rules as it has proposed in a companion proceeding.[127] Moreover, the program must be carefully structured to ensure that it serves its intended purpose. Finally, the Commission must adopt horizontal subscriber limits for cable before an incubator program can be used to increase minority and female ownership of cable facilities.

A. For the Incubator Program to Lead to Actual Ownership of Broadcast Stations by Minorities and Women, the Commission Should Not Raise the Present Ownership Limits

The incubator program will be a meaningless gesture if

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[126] Id. at ¶ 16. The Commission originally proposed the incubator program in 1992, in the context of relaxing the national and local radio ownership rules. Revision of Radio Rules and Policies, FNPRM, MM Docket No. 91-140, 7 FCC Rcd 6387 (1992). However, the Commission never issued a rule implementing the program.

[127] Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Review of Policy and Rules, Further Notice of Proposed Rule Making, MM Docket Nos. 91-221 and 87-8, FCC 94-322, released Jan. 17, 1995 [hereinafter FNPRM].